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In The
Supreme Court of the United States

A.A., *et al.*, Individually and as Representatives of a class pursuant to Fed. R. Civ. P. 23(a) and 23(b),

Cross-Petitioners,

v.

STATE OF NEW JERSEY, *et al.*,

Cross-Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit Before Judgment

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

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QUESTIONS PRESENTED

I. Whether the community notification provisions of New Jersey's Internet Registry Act, Public Law 2001, Chapter 167 (codified at N.J. Stat. Ann. §§ 2C:7-12 to -19), authorizing the release of sex offenders' registry information to the public via the Internet, impose punishment, such that their retroactive application violates the Double Jeopardy and Ex Post Facto Clauses of the United States Constitution.

II. Whether the government's collection and dissemination of personal information about individuals in a central registry implicates a constitutionally-cognizable privacy interest, such that New Jersey's Internet Registry Act, Public Law 2001, Chapter 167 (codified at N.J. Stat. Ann. §§ 2C:7-12 to -19), which authorizes the release of sex offenders' registry information to the public via the Internet, impermissibly impinges upon that privacy interest.

PARTIES TO THE PROCEEDING

Cross-petitioners are members of a certified class consisting of all persons found to have committed a sex offense or offenses, as defined in N.J. Stat. Ann. § 2C:7-2(b), who, pursuant to New Jersey Public Law 2001, Chapter 167 (codified at N.J. Stat. Ann. §§ 2C:7-12 to -19), now are, or in the future will be, subject to having information about them which is contained in the sex offender central registry established pursuant to N.J. Stat. Ann. § 2C:7-4 made available to the public through the Internet, or who are subject to Article IV, Section 7, paragraph 12 of the New Jersey Constitution.

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OPINION BELOW

The opinion of the United States District Court for the District of New Jersey, which is reported at 176 F. Supp.2d 274 (D.N.J. 2001), is reproduced in Petitioner's Appendix A (Pet. App. 1a to 55a). The district court's order granting in part and denying in part cross-petitioners' motion for a preliminary injunction is reproduced in Petitioner's Appendix B (Pet. App. 56a to 57a).

JURISDICTION

The order of the district court was entered on December 6, 2001. Cross-petitioners filed a notice of appeal in the Court of Appeals for the Third Circuit on December 10, 2001. This Court's jurisdiction is involved pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Ex Post Facto Clause of the United States Constitution applicable to the States provides: "No State shall . . . pass any . . . ex post facto law." U.S. Const. art. I § 10.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V.

New Jersey's Internet Registry Act, New Jersey Public Law 2001, Chapter 167, codified at N.J. Stat. Ann.

§§ 2C:7-12 to-19, is reproduced in Petitioner's Appendix C (Pet. App. 58a to 64a).

STATEMENT OF THE CASE

Procedural History

On October 15, 2001, cross-petitioners, all of whom have been convicted of sex offenses in New Jersey and are subject to registration and community notification pursuant to Megan's Law, filed this action in federal district court challenging the constitutionality of the Internet Registry Act and Article IV, Section 7, Paragraph 12 of the New Jersey Constitution, and seeking declaratory and injunctive relief. Shortly after filing the complaint, cross-petitioners moved for a preliminary injunction against implementation of the Internet Registry Act, which was scheduled to take effect on January 1, 2002, asserting three grounds for relief under the United States Constitution. First, they argued that the Act violated their right to privacy in their home addresses, in that it authorized the disclosure of that protected information to those with no need for it. Second, they argued that the Act violated their right to privacy in the totality of the information collected in the registry, in that it authorized the disclosure of vast amounts of personal information, compiled by the government, to those with no need for the information. And third, they argued that the Act violated the Ex Post Facto and Double Jeopardy Clauses of the United States Constitution, because it imposed additional punishment on cross-petitioners after they had already served their sentences for crimes committed long ago. Cross-petitioners also moved for class certification, for a sealing order, and for leave to proceed under pseudonyms.

On December 6, 2001, the district court issued its opinion and order, granting in part and denying in part the application for a preliminary injunction. The district court ruled for cross-petitioners solely on their first claim, that the Act violated their right to privacy in their home addresses, and entered an order enjoining the State from including in the Internet registry cross-petitioners' home addresses, but ruled for the petitioners with respect to the other claims, thus allowing the State to otherwise proceed with the registry. The court also certified a class with four sub-parts, and granted cross-petitioners' motions for a sealing order and for leave to proceed under pseudonyms. On December 10, 2001, cross-petitioners filed a notice of appeal from that portion of the district court's order which denied their motion for a preliminary injunction, and sought a stay pending appeal from the district court. On December 13, 2001, the district court denied cross-petitioners' application for a stay pending appeal. Cross-petitioners then moved in the United States Court of Appeals for the Third Circuit for a stay, which was denied on December 21, 2001. The petitioners filed a notice of cross-appeal on December 19, 2001.

The cross-appeals have been fully briefed in the Third Circuit and oral argument has been scheduled for September 2002. Nevertheless, on or about May 27, 2002, petitioners filed a petition for a writ of certiorari before judgment, seeking review of the district court's decision partially enjoining implementation of the Internet Registry Act. Cross-petitioners are submitting a separate response in opposition to that petition. However, cross-petitioners also submit this conditional cross-petition for a writ of certiorari before judgment and request that, in the event that this Court grants petitioners' application, it also

review the district court's holdings that the retroactive application of New Jersey's Internet Registry Act does not violate the Ex Post Facto and Double Jeopardy Clauses of the United States Constitution and does not impermissibly impinge upon registrants' privacy interest in the compilation of the information contained in the registry.

Statement of Facts

New Jersey is the home of "Megan's Law." And for eight years, the courts of the Third Circuit and New Jersey have grappled with the constitutional questions New Jersey's Megan's Law presents. As first enacted in 1994, the law required all persons convicted of a sex offense to register with the police and provide their name, physical description, home address, employment or school address, vehicle used and license plate number, and the offense involved, for inclusion in a central registry. N.J. Stat. Ann. §§ 2C:7-4(b)(1) and (2). Registrants whose conduct was repetitive and compulsive were required to verify their addresses with law enforcement quarterly, while other registrants were required to do so annually. N.J. Stat. Ann. § 2C:7-2(e). All registrants were required to notify law enforcement of any change of address. N.J. Stat. Ann. § 2C:7-2(d).

The law further authorized notification to the public of this information, according to a three-tiered system. For those deemed a low risk of re-offense (Tier 1), pursuant to a risk assessment scale developed by the Attorney General, the registry information would be provided solely to local law enforcement agencies likely to encounter the individuals. For those deemed a moderate risk of re-offense (Tier 2), in addition to Tier 1 notices, the police were authorized to provide the information to organizations in the

community, including schools, religious institutions and youth organizations, working with vulnerable populations. For those whose risk of re-offense was deemed high (Tier 3), notification was authorized, in addition, for members of the public likely to encounter the offenders. N.J. Stat. Ann. § 2C:7-8(c). The law, in its original form, did not afford registrants the opportunity to contest their tier designation or the scope of notification.

In *Doe v. Poritz*, 142 N.J. 1, 662 A.2d 367 (1995), the New Jersey Supreme Court upheld Megan's Law against constitutional challenge. However, in order to do so, the Court made two significant adjustments to the statutory scheme. First, in order to avoid a conflict with the Ex Post Facto and Double Jeopardy Clauses of the United States and New Jersey Constitutions, and offenders' right to privacy under both Constitutions, it construed the scope of notification authorized for those offenders deemed to be of moderate risk of re-offense – those in Tier 2 – to incorporate a "likely to encounter" standard based upon geography. *Doe,* 662 A.2d at 381. The New Jersey Supreme Court found that offenders had a privacy interest cognizable under the New Jersey and United States Constitutions in their home addresses, as well as in the "totality of the information" contained in the registry. *Id.* at 408-13.[1]

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[1] In so holding, the court relied upon this Court's decision in *United States Dep't of Justice v. Reporters' Committee for Freedom of the Press*, 489 U.S. 749 (1989). Although *Reporters' Committee for Freedom of the Press* involved the statutory meaning of privacy for purposes of exemptions to the Freedom of Information Act, the New Jersey Supreme Court found its reasoning applicable to the question of whether the Constitution protects against the government's disclosure of information that it has compiled about an individual. *See Doe*, 662 A.2d at 409-11.

Second, in order to avoid a conflict with offenders' due process rights under both Constitutions, it required the State to provide offenders with notice of their tier designation and proposed scope of notification, and an opportunity for judicial review before notification was actually undertaken. *Id.* at 382-83. With these two changes incorporated, the New Jersey Supreme Court found that the statute was constitutional.

In *Artway v. Attorney General,* 81 F.3d 1235 (3d Cir. 1996), the United States Court of Appeals for the Third Circuit had its first opportunity to review the constitutionality of Megan's Law. Finding that only the challenge to the registration provisions was ripe at that time, the Third Circuit held that the provisions were consistent with the United States Constitution, including the Ex Post Facto and Double Jeopardy Clauses. In so holding, the Court of Appeals relied largely, as had the New Jersey Supreme Court, on the fact that the statute was not excessive in relation to its remedial purpose of public safety. Then, in *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997), the Third Circuit reviewed the constitutionality of Megan's Law notification. Once again, in upholding the statute against constitutional challenge, including under the Ex Post Facto and Double Jeopardy Clauses, the Court of Appeals relied on the limiting construction given the statute by the New Jersey Supreme Court, pursuant to which notification was provided solely to those with a need for the information based upon the likely to encounter standard. *See E.B.*, 119 F.3d at 1098. Further fine-tuning the Megan's Law system, the Third Circuit also held that,

consistent with offenders' procedural due process rights under the United States Constitution, the State must bear the burden of persuasion in establishing an offender's tier level and the appropriate scope of notification, and must meet this burden by clear and convincing evidence. *See E.B.*, 119 F.3d at 1108, 1111. Cross-petitions for a writ of certiorari from this Court for review of the Third Circuit's decision were denied. *See W.P. v. Verniero,* 522 U.S. 1109 (1998); *Verniero v. W.P.*, 522 U.S. 1110 (1998).

The litigation continued. In *Paul P. v. Verniero*, 170 F.3d 396 (3d Cir. 1999), the Court of Appeals faced two different issues than had previously been presented, concerning whether the notification provisions of Megan's Law violated registrants' right to privacy under the United States Constitution. The registrants contended that the notification provisions violated their right to privacy in their home addresses and in the totality of the information compiled in the registry, as the New Jersey Supreme Court had found in *Doe v. Poritz*. In resolving the former issue, the Court of Appeals acknowledged that offenders' privacy interests in their home addresses merited constitutional protection. *See Paul P.*, 170 F.3d at 404. Nevertheless, balancing those interests against the State's interest in providing the information to those with a need for it, the Third Circuit upheld the statute. The Court of Appeals declined to decide the registrants' claim that the notifications provisions also implicated their right to privacy in the totality of the information contained in the registry, finding that, even if such an interest were cognizable under the Constitution, it too would be outweighed by the State's interest in providing the information to those likely to encounter an offender. *See id.* at 404.

Consistent with the foregoing decisions of the Third Circuit and the Supreme Court of New Jersey, for seven years Megan's Law notification in New Jersey has been provided by the police to those likely to encounter an offender, based upon geographic proximity. In the year 2000, however, tired of the restraints on notification imposed by the courts, the Legislature and the voters of New Jersey approved an amendment to the state Constitution to facilitate notification to the general public via the Internet.[2]

The amendment does not, by its terms, create a system of public disclosure of the personal information it describes; rather, it authorizes the Legislature to create such a system. Accordingly, the Legislature passed, and on July 23, 2001, the Governor signed into law, the Internet Registry Act, Public Law 2001, Chapter 167, which has been codified at N.J. Stat. Ann. § 2C:7-12 *et seq.* The Act authorizes the creation of a central sex offender registry, available to the public through the Internet "without limitation." P.L. 2001, Ch. 167 § 9. Through the registry, any person across the globe with Internet access may

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[2] The amendment, which now constitutes Article IV, Section 7, paragraph 12 of the New Jersey Constitution of 1947, provides that:

> Notwithstanding any other provision of this Constitution and irrespective of any right or interest in maintaining confidentiality, it shall be lawful for the Legislature to authorize by law the disclosure to the general public of information pertaining to the identity, specific and general whereabouts, physical characteristics and criminal history of persons found to have committed a sex offense.

N.J. Const. of 1947, Art. IV, § 7, ¶ 12. The constitutionality of the amendment itself is also at issue in cross-petitioners' suit. However, that issue is not before the Court at this time, since it was not raised in the motion for a preliminary injunction.

obtain the following information about registrants who have been deemed to be a moderate or high risk of re-offense, and for whom a court has ordered community notification: the offender's name and any aliases used; any sex offense committed with a brief description; the offender's assessed risk of re-offense; the offender's age, race, sex, date of birth, height, weight, hair, eye color and distinguishing marks; a photograph of the offender; a description of the offender's car and license plate number; and the street address, zip code, municipality and county in which the offender resides. P.L. 2001 Ch. 167 § 2(g). Moderate risk (Tier 2) offenders whose sole offense was an incest or statutory rape offense are exempted from the registry, as are Tier 2 juveniles who have committed only one offense. *Id.* §§ 2(d)(1), (2), (3).

Thus, the Internet registry authorized by the Act differs from the system of community notification that has been in place for the past seven years in at least two critical respects. First, it does away with the restriction on notification to those likely to encounter an offender that has been a signature feature of New Jersey's Megan's Law since its inception. In stark contrast to the prior system of community notification, pursuant to the Act, anyone in the entire world who has access to the Internet may obtain information about any offender included in the registry. The Internet registry provides such global notification despite the fact that affordable technology presently exists that could restrict access through the use of a password system to only those with a need for the information. Pet. App. at 45a-46a, n.25.

Second, the Act does away with the distinction between moderate (Tier 2) and high risk (Tier 3) offenders. Whereas pursuant to the prior system of community

notification, only Tier 3 offenders were subject to notification to members of the public likely to encounter them, in addition to local organizations and schools, under the Act the same maximum level of disclosure is authorized for both groups of offenders, despite substantial differences in risk levels among members of the two groups.

The Internet registry supplements rather than replaces the current system of notification. Thus, in addition to the registry, the police will continue to undertake community notification, providing information about offenders to those who are likely to encounter them, subject to the very same limitations that have been in place for years. Pet. App. at 52a. Thus, for those who are within the geographic zone for which the courts have approved notification, the Internet registry provides access to information already provided by the police.

The limited system of community notification that has been in place for the past seven years has inflicted severe consequences on sex offenders. As demonstrated by the forty-three certifications and affidavits submitted to the district court and the Third Circuit by cross-petitioners describing effects of Megan's Law notification, dated from 1995 to the present, these people have been subjected to acts of vigilantism (or lived in constant fear of such acts), harassment, and discrimination in housing and the workplace. For example, cross-petitioner A.E. lost his job and apartment and became homeless after the community notification flyer containing his information was published in a major newspaper. Within days of community notification, registrant F.G. received a threatening letter. The next day someone attempted to murder him by firing five shots from a high caliber handgun into the downstairs front windows of his home.

As cross-petitioners demonstrated through the affidavits and certifications of numerous expert psychologists, submitted to the district court and Third Circuit, community notification has also interfered with offenders' ability to obtain and benefit from treatment, which has been shown to be an important factor in reducing recidivism. On a practical level, offenders are frequently forced out of their homes and jobs, making consistent participation in treatment a logistical and financial challenge. In addition, because of the stress caused by notification, offenders frequently become depressed and anxious, and are consequently less able to benefit from treatment. Thus, they are unable to become rehabilitated and reintegrated into the community. This is particularly the case for juvenile offenders like cross-petitioner A.C., for whom widespread notification may make readjustment to the community impossible, according to the experts consulted by cross-petitioners.

Nevertheless, with the Internet Act, the State declared that even a moderate risk offender (of which there are over 2,300 in New Jersey, as compared to approximately 150 high risk offenders) must be subjected to notification to Internet users across the globe. According to recent estimates, approximately 420 million persons worldwide have access to the Internet, including 104 million persons in the United States alone. The State posted its Internet registry on its website on February 21, 2002.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT A WRIT OF CERTIORARI TO CONSIDER CROSS-PETITIONERS' CLAIMS THAT THE RETROACTIVE APPLICATION OF THE INTERNET REGISTRY ACT VIOLATES THE EX POST FACTO AND DOUBLE JEOPARDY CLAUSES OF THE UNITED STATES CONSTITUTION.

As the Court evidently recognized in granting a writ of certiorari to the Ninth Circuit to review *Godfrey v. Doe*, *cert. granted*, 122 S. Ct. 1062 (2002), No. 01-729, the constitutionality of the retroactive application of states' community notification statutes is of great public importance. This is true not only from the perspective of the states that seek to enforce these statutes retroactively, but also from the perspective of the thousands of former offenders whose lives are changed forever when they become subject to such laws. Since the Court has never before granted certiorari in a case concerning the constitutionality of states' sex offender registration and community notification laws, *Godfrey* presents the Court with an important opportunity to address whether such laws are punitive and thus subject to the limitations of the Ex Post Facto and Double Jeopardy Clauses. Like the respondents in *Godfrey*, cross-petitioners contend that these measures are punitive, and therefore may not constitutionally be applied to persons who committed their crimes before the measures were enacted.

This case should be heard with *Godfrey* because, while the statutes at issue in the two cases both authorize worldwide (and thus excessive) Internet notification, they differ in significant respects. For example, whereas Alaska's

Internet registry includes registrants' place of employment, New Jersey's Internet registry does not – although that information continues to be provided door-to-door to those in geographic proximity to an offender. In addition, Alaska includes a wider range of persons in its Internet registry. Whereas Alaska places all of its sex offenders on its website, New Jersey includes only those categorized as moderate or high risk offenders. Thus, the Court's decision in *Godfrey* will not necessarily decide the legal question presented in this case or provide relief to cross-petitioners. Accordingly, the Court should grant certiorari to consider cross-petitioners' claim that the New Jersey statute also imposes punishment, notwithstanding its differences from the Alaska statute.

In addition, this case should be heard at the same time as *Godfrey* because plaintiffs have assembled a record that, although not complete – by virtue of the fact that the district court's decision was rendered upon a motion for a preliminary injunction – reflects New Jersey's more than seven years of implementing Megan's Law. This record, which includes over forty-three certifications and affidavits describing the effects of community notification on registrants, establishes that they are frequently subjected to acts of vigilantism, harassment, and discrimination in housing and the workplace, and routinely suffer from anxiety and depression. The record also includes certifications from expert psychologists establishing that notification significantly impedes registrants' ability to benefit from treatment and become rehabilitated. Together, this evidence provides considerable support for cross-petitioners' argument that notification imposes punishment, evidence that has not been assembled in *Godfrey*. This evidence will be particularly helpful to the Court in

deciding whether unlimited notification imposes an "affirmative disability or restraint," *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169 (1963), a critical question for purposes of determining whether the notification statutes impose punishment in violation of the Ex Post Facto and Double Jeopardy Clauses.

II. THE COURT SHOULD GRANT A WRIT OF CERTIORARI TO CONSIDER CROSS-PETITIONERS' CLAIM THAT THE GOVERNMENT'S COMPILATION AND DISSEMINATION OF THEIR PERSONAL INFORMATION IMPLICATES A CONSTITUTIONALLY-COGNIZABLE PRIVACY INTEREST UPON WHICH THE INTERNET REGISTRY ACT IMPERMISSIBLY INTRUDES.

In the event that the Court grants a writ of certiorari to consider the issue raised by petitioners, cross-petitioners request that the Court also consider their claim that the State's compilation and disclosure of their personal information in the sex offender registry implicates a constitutionally-cognizable privacy interest upon which the Internet Registry Act impermissibly intrudes. The district court ruled against cross-petitioners on this argument. Pet. App. at 46a to 51a.

The Court should grant certiorari on this issue for three reasons. First, it is intertwined with the two other questions presented in this case, so that the Court should consider all three issues in the event that it grants a writ of certiorari in this matter. Second, there is a conflict between a state court of last resort and a United States Court of Appeals on this question. *Compare Doe v. Poritz*, 662 A.2d at 408-13 (finding, pursuant to *Reporters' Committee for Freedom of the Press*, that the government's

compilation and disclosure of information from various sources, even if separately available in public records, implicates a privacy interest protected by the United States Constitution) with *Cutshall v. Sundquist*, 193 F.3d 466, 480-81 (6th Cir. 1999) (rejecting argument under *Reporters' Committee for Freedom of the Press* that the Constitution recognizes a privacy interest in information compiled by the government), *cert. denied*, 529 U.S. 1053 (2000).

Third and finally, the Court should grant a writ of certiorari to consider this issue in light of its enormous public importance. As the Court anticipated in *Whalen v. Roe*, 429 U.S. 589 (1977), there is an undeniable "threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files." *Id.* at 605. The government has a great deal of information in its possession about each of us, not merely those convicted of a criminal offense. For example, various branches of the government have in their files not only the names and home addresses of most individuals, but also their photographs, income tax returns, medical information, professional licenses, voter registration, political donations, gambling wins or losses, vehicle registration and license plate numbers, and travel patterns. Although some of this information may be contained in publicly-available records, absent a government-sponsored registry compiling it, the information would not otherwise be available in one easily-accessible location. As this Court recognized in *Reporters' Committee for Freedom of the Press*, writing of the separate pieces of information compiled in "rap sheets," "the very fact that [government] funds have been spent to prepare, index, and maintain these criminal history files demonstrates that

the individual items of information in the summaries would not otherwise be 'freely available' either to the officials who have access to the underlying files or to the general public." 489 U.S. at 764. Thus, there is a tremendous practical difference between pieces of information remaining scattered, even in public records, and their being compiled in one central location by the government for public consumption.

Whether the compilation and disclosure of such information by the government implicates a constitutionally-cognizable privacy interest is unquestionably a question of great public importance. For, if the Constitution does not recognize such an interest, then, absent a specific statutory prohibition against doing so, the government could assemble the information described above and make it available to the public without limitation, including via the Internet. This Court has never resolved whether such action implicates a privacy interest recognized by the Constitution: although the Court stated in *Reporters' Committee* that the right to privacy protected by the Constitution is "not the same" as the right to privacy recognized under the Freedom of Information Act, 489 U.S. at 762 n.13, the Court did not explain then – and has never since – how these rights differ. Accordingly, in the event that the Court grants certiorari on any of the issues presented in this matter, it should utilize the opportunity to address the lingering, and critically important, question of whether the government's disclosure, without restriction, of information it has compiled about its citizens implicates a constitutionally-cognizable privacy interest.

CONCLUSION

For the foregoing reasons, in the event that the Court grants the State's petition for a writ of certiorari before judgment, the Court also should consider cross-petitioners' claims that the retroactive application of New Jersey's Internet Registry Act violates the Ex Post Facto and Double Jeopardy Clauses of the United States Constitution, and that the Internet Registry Act impermissibly impinges upon registrants' constitutional privacy interest in the compilation of their personal information contained in the registry.

Respectfully submitted,

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v.

STATE OF NEW JERSEY, *et al.*, *Cross-Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit before Judgment

BRIEF OF THE CROSS-RESPONDENTS IN OPPOSITION TO THE CROSS-PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

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REASONS FOR DENYING THE CROSS-PETITION

I. This Court's Review in *Godfrey v. Doe* of Whether the Alaska Sex Offender Registration and Internet Notification Laws Impose Punishment for Purposes of the *Ex Post Facto* Clause Does Not Necessitate, Nor Is Advanced By, Granting *Certiorari* to Review That Same Issue in the Context of New Jersey's Sex Offender Internet Registry Law.

Measures such as sex offender registry laws are imbued with exceptional importance to our society, at once implicating both public safety concerns over how we can best protect our communities from potentially dangerous sex offenders and constitutional considerations related to the potential application and interpretation of provisions designed to safeguard individual rights. The cross-petitioners and the cross-respondents concur that this Court's grant of *certiorari* in *Doe v. Otte*, 259 F.3d 979 (9th Cir. 2001), *cert. granted sub nom.*, *Godfrey v. Doe*, 122 U.S. 1062 (2002) (No. 01-729), evinces a recognition of the grave public importance implicated by the issue of whether the implementation of sex offender community notification through the Internet imposes punishment in violation of the *Ex Post Facto* Clause of the United States Constitution.

The cross-petitioners, noting that their claim that the New Jersey sex offender Internet registry imposes unconstitutional punishment parallels the legal inquiry at issue in *Godfrey v. Doe*, conditionally request this Court's review should it grant New Jersey's petition for *certiorari* before judgment on the question, also arising in the same context of providing public access to information about comparatively dangerous sex offenders through an Internet registry, of whether there is a constitutionally protected privacy interest in avoiding disclosure of a person's home address. Yet, notwithstanding the manifest public importance of the constitutionality of sex offender community notification laws, the cross-petitioners have provided scant justification for this Court to deviate from normal appellate practice to review the decision below

rejecting the contention that retroactive application of New Jersey's sex offender Internet registry law imposes punishment.

At the outset, it should be understood that the court's ruling on the cross-petitioners' punishment claim in *A.A. v. New Jersey* is not inconsistent with Third Circuit precedent, nor does it necessarily conflict with the Ninth Circuit's decision in *Doe v. Otte*. The cross-petitioners concede that New Jersey's sex offender Internet registry law lacks certain features of the Alaska law which led the Ninth Circuit to conclude that Alaska's sex offender registration and Internet registry scheme is punitive. Cross-Pet. at 12-13. Specifically, the cross-petitioners acknowledge that New Jersey, unlike Alaska, does not publish on its Internet registry information concerning an offender's place of employment. The cross-petitioners also admit that, in contrast to Alaska's system in which all sex offenders appear on the Internet registry, New Jersey provides a screening process predicated upon an individualized risk assessment and tiering designation, which also include several specific statutory exceptions, which results in registry publication of only high-risk and certain moderate risk offenders.

Thus, as the cross-petitioners acknowledge, Alaska's sex offender Internet registry law is generally broader in scope, in both the particular information included on the registry and the range of offenders to whom the registry law applies, than the New Jersey law. The Ninth Circuit Court of Appeals in fact relied upon these very facts in discerning a punitive effect based on that court's conclusion, however misguided, that the Alaska Internet registry imposes an affirmative disability or restraint. *Doe v. Otte*, *supra*, 259 F.3d at 988. Focusing on the Alaska registry's applicability to all convicted offenders and the inclusion on the web site of the names and addresses of sex offenders' places of employment, the Ninth Circuit found punitive the Alaska system of sex offender registration and Internet notification, expressly contrasting that system

with those of other states like Tennessee and New York (and, by implication, New Jersey) which limit the particular information disclosed to "the amount deemed necessary to protect the public concerning a specific sexual offender" or which permit disclosure "only on the basis of an individualized assessment of the risk of recidivism[.]" *Ibid.* (internal quotations and citations omitted).

As the cross-petitioners suggest, a holding by this Court that the Alaska law is punitive may or may not dispositively resolve that same issue with respect to the New Jersey law, but such a decision would not necessarily signal a conflict with precedent handed down by either the Third Circuit or the Supreme Court of New Jersey finding that sex offender community notification does not impose punishment within the meaning of the *Ex Post Facto* or Double Jeopardy Clauses, and is likely to provide any further guidance necessary to answer the question with regard to New Jersey's law. It should be understood that, should this Court reverse the Ninth Circuit's decision and hold that Alaska's sex offender Internet registry does not impose unconstitutional punishment, that conclusion would unquestionably apply to New Jersey's somewhat narrower Internet registry law. Thus, despite the clear public interest implicated by the Internet registry, the cross-petitioners' reference to the possibility that this Court's decision in *Godfrey v. Doe* may not definitively resolve the cross-petitioner's similar challenge to New Jersey's sex offender registry law appears to fall short of the requisite showing necessary to justify a grant of *certiorari*.

Similarly, the cross-petitioners' argument that the record assembled in this matter will assist the Court in its consideration of the Alaska law in no way satisfies the requirements of Rule 10 or 11. The cross-petitioners aver that the record assembled with respect to New Jersey's law will be "particularly helpful to the Court" in deciding whether notification imposes an affirmative disability or restraint in the

context of the punishment analysis set forth in *Hudson v. United States*, 522 U.S. 93, 99 (1997), which directs consideration of the seven factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). Cross-Pet. at 13-14. This assertion plainly ignores this Court's direction, in considering the *Mendoza-Martinez* factors, to evaluate the purpose and effect of the statute "on its face." *Hudson*, *supra*, 522 U.S. at 100.

This precedent renders inutile the materials the cross-petitioners seek to proffer, which includes "certifications and affidavits describing the effects of community notification on registrants" (cross-pet. at 13) related to third party acts or offenders' own reactions when the community learns of their criminal convictions (but, it should be pointed out, these materials do not actually involve situations where sex offender information was posted on an Internet registry). In considering whether to grant the cross-petitioners' motion for a preliminary injunction, the district court, applying the *Hudson* formulation, held that such unintended secondary repercussions are neither directly imposed nor mandated by the law, concluding that "these 'practical hardships' ... cannot be directly attributed to the operation of statute itself, but are rather, as the Third Circuit observed in *E.B.*, the 'indirect effects' of the disclosure[.]'" *A.A. v. New Jersey*, 176 F.Supp.2d at 290. As summarized by the district court,

> On its face, the statute merely mandates that certain accurate registry information about a subset of Megan's law registrants be made available to the general public via the Internet. Any "punitive effects," such as ostracism or incidents of private violence, are therefore incidental to the legislature's overriding remedial purpose of providing "susceptible members" of the public with the information they need to take precautions to protect themselves and their families and are more directly

> the consequence of the public reaction to the registrant's conviction.

Id., citing *E.B. v. Verniero*, 119 F.3d 1077, 1081 (3d Cir. 1997), *cert. denied*, 522 U.S. 1109 (1998), and *Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997), *cert. denied*, 522 U.S. 1122 (1998).

Mirroring the cross-petitioners' unavailing evidentiary argument below, the materials that they assert will aid this Court's consideration generally relate to indirect effects cross-petitioners seek to ascribe to inclusion on the sex offender Internet registry or to sex offender community notification in general. If the *Hudson* inquiry prescribed by this Court is properly limited to consideration of the statute on its face, the proffered materials would provide virtually no assistance in determining whether the sex offender Internet registry laws of New Jersey, Alaska or any other state impose an affirmative disability or restraint within the meaning of the *Hudson* punishment inquiry.

Moreover, based on information and belief, the cross-petitioners will accomplish their goal of placing before this Court the record materials describing effects they seek to attribute to community notification by virtue of an *amicus* submission in support of the respondents in *Godfrey v. Doe*. Consequently, there is no force or validity to any contention that a grant of *certiorari* to review the cross-petitioners' punishment claim with respect to the New Jersey sex offender Internet registry law is justified in order to enable this Court to consider these record materials of arguable relevance, and certainly no basis to conclude that such a contention satisfies the showing required by Rule 10 or 11.

II. The Salient Jurisdictional Conflict in Informational Privacy Precedent Is with Respect to Whether There Exists a Constitutionally Cognizable Privacy Interest in Avoiding Disclosure of Personal Information, Rather than Whether There Is an Independent Privacy Interest Implicated by the Compilation of Otherwise Public Information.

The cross-petitioners also conditionally seek this Court's review of their claim that the State's compilation and disclosure of otherwise public information in a sex offender Internet registry implicates a constitutionally protected privacy interest. Neither the district court in *A.A v. New Jersey* nor the Third Circuit have accepted this proposed constitutional privacy interest in prior Megan's Law-related challenges to New Jersey's sex offender notification laws. It is also axiomatic that the decisions of neither the Supreme Court of New Jersey nor the Sixth Circuit Court of Appeals, which the cross-petitioners cite as the jurisdictional conflict justifying this Court's grant of *certiorari* to review this claim, are controlling in a federal constitutional claim brought before the Third Circuit.[1]

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[1]It should be noted that, although not highlighted by the cross-petitioners as a jurisdictional conflict, the Third Circuit has expressly disavowed the finding of the Supreme Court of New Jersey that the cross-petitioners reference, opining that "[w]e do not agree with the Supreme Court of New Jersey's conclusion in *Doe* that the recognition in *Reporters Committee* of a statutory right to privacy for 'Rap Sheets' under FOIA dictates that a federal Constitutional right to privacy is implicated by notification." *E.B. v. Verniero*, 119 F.3d at 1103, n.23. Moreover, the New Jersey Supreme Court's recognition of a privacy interest in avoiding disclosure of the "totality" of the information compiled and distributed in Megan's Law notices (pursuant to New Jersey's community notification law, N.J. Stat. Ann. §§ 2C:7-1 to -11) would appear to be something of a red herring, considering that the court ultimately found the State's "compelling interest in public disclosure" to substantially outweigh the sex offender's "diminished privacy interest" in the information. *Doe v. Poritz*, 662 A.2d 367, 411-12 (N.J. 1995).

Although not cited in the cross-petition, the Third Circuit has previously refused to accept cross-petitioners' assertion, advanced in prior challenges to New Jersey's sex offender community notification law, that there is a constitutionally cognizable privacy interest implicated through the compilation and assembly of otherwise public information concerning sex offenders. The Third Circuit eschewed the opportunity to recognize the asserted privacy interest, and instead framed the issue as "whether the degree of effort needed to assemble otherwise available but dispersed information ought to be considered as a factor in determining the reasonableness of an individual's expectation of privacy in the compiled data." *Paul P. v. Verniero*, 170 F.3d 396, 404 (3d Cir. 1999).[2] This ruling may be contrasted with Sixth Circuit precedent cited by the cross-petitioners, in which that court flatly rejected the notion that the Constitution encompasses a general right to non-disclosure of private information, holding therefore that "[t]he Constitution does not provide [a sex offender] with a right to keep his registry information private[.]" *Cutshall v. Sundquist*, 193 F.3d 466, 481 (6th Cir.), *cert. denied*, 529 U.S. 1053 (1999).

Thus, the cross-respondents agree with the cross-petitioners that the precedent articulated by the Sixth Circuit in *Cutshall v. Sundquist* does indeed signal a split in authority on an issue of great public importance. However, the conflict pertains to the issue of the very existence of a constitutional right to non-disclosure of private information, which divergence is reflected in New Jersey's Petition for *Certiorari* Before Judgment (No. 01-1727, filed May 27, 2002). Pet. at 17-20. Notwithstanding the intimated conflict with the Supreme Court of New Jersey decision in *Doe v. Poritz*, a review of the Sixth Circuit decision in *Cutshall v. Sundquist*

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[2]The Third Circuit ultimately found it unnecessary to decide this specific question in the case before it, based on its finding of a compelling government interest in preventing sex offenses. *See Paul P. v. Verniero*, *supra*, 170 F.3d at 404.

reveals that the circuit court's decision was clearly predicated on a rejection of an asserted constitutionally cognizable privacy interest in personal information in general, rather than any consideration whatsoever of the specific "compilation" interest which the cross-petitioners here assert. *Cutshall v. Sundquist*, *supra*, 193 F.3d at 480-81.

Given the rationale of the Sixth Circuit precedent, it is apparent that the salient issue of divergence between the two cited decisions pertains to the recognition of a constitutionally cognizable privacy interest in avoiding disclosure of personal information (with the element of compilation to be considered, at least according to the Third Circuit precedent applicable to the matter on which *certiorari* is sought, as relevant to the reasonableness of any expectation of privacy in the information at issue). This conflict, which could be fairly characterized as an issue of great public importance, could be resolved if this Court were to grant *certiorari* to review New Jersey's claim related to an informational privacy interest in the non-disclosure of a sex offender's home address. The "compilation" argument advanced by the cross-petitioners might also provide an alternative vehicle for this Court to address the issue of whether there exists a constitutionally cognizable interest in avoiding disclosure of personal information, although it would be less apt because, as the specific nuance of compilation is not necessarily implicated in the Sixth Circuit precedent attests, the asserted jurisdictional split is far less pervasive.

CONCLUSION

For the reasons stated above, the cross-respondents State of New Jersey, Governor of New Jersey James E. McGreevey, Attorney General of New Jersey David Samson, and New Jersey State Police Superintendent Joseph J. Santiago respectfully request that the cross-petition for a writ of *certiorari* be denied.

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